APR 12 1974

In The

Supreme Court of the United States

October Term, 1973

No. 73-1204

STEPHEN EARL SQUIRE,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The respondent, the Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on October 8, 1973, not be granted.

OPINION BELOW

The opinion of the Supreme Court of V rginia is reported at 214 Va. 260 (1973).

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

Is The Virginia Disorderly Conduct Statute Unconstitutionally Vague Or Overbroad?

II.

Was The Petitioner Denied Due Process As A Result Of Juror Bernet's Not Being Struck?

III.

Was The Petitioner Subjected To Double Jeopardy?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 18.1-253.2 Code of Virginia (1950), as amended provides as follows:

If any person behaves in a riotous or disorderly manner in any street, highway, public building, or any other public place, other than those mentioned in the preceding section (§ 18.1-253.1), or causes any unnecessary disturbance in or on any public conveyance, by running through it, climbing through windows or upon the seats, failing to move to another seat when lawfully requested to so move by the operator, otherwise annoying passengers or employees therein, he shall be guilty of a misdemeanor.

Section 18.1-255 Code of Virginia (1950), as amended, provides as follows:

If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a misdemeanor, and on conviction fined in any sum not less than two dollars and fifty cents nor more than five hundred dollars, in the discretion of the jury or the judge trying the case without a jury.

Section 16.1-136 Code of Virginia (1950), as amended, provides as follows:

"Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, except in the case of an appeal from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence, the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit or corporation court."

STATEMENT OF THE CASE

Respondent agrees with the Statement of the Case as pre sented by the Petitioner, except that on or before the tim Petitioner was arrested, a crowd had gathered.

Further, Respondent disagrees with Petitioner's state ment that the Municipal Court of the City of Charlottes ville found that the Petitioner was guilty only because h had carried a sign accusing the military of murder.

Lastly, as to the *voir dire* examination of the Juro Bernet, the juror testified that, in effect, he was speakin generally and not in connection with a specific case. Th juror further stated that he would listen to both sides o the case impartially. The Trial Court asked the juro whether his decision would depend upon surrounding ci cumstances and on all the circumstances of the case. Th juror answered the question in the affirmative.

ARGUMENT

I.

The Virginia Disorderly Conduct Statute Is Not Unconstitutionally Vague Or Overbroad.

Section 18.1-253.2, Code of Virginia (1950), as amende provides, in pertinent part, as follows:

> "If any person behaves in a riotous or disorderly ma ner in any street, highway, public building, or oth public place, other than those mentioned in the pr ceding section (§ 18.1-253.1) . . . he shall be guilty o misdemeanor."

When a State court has provided a construction of state statute, that construction is binding upon the Unit States Supreme Court. *Gooding* v. *Wilson,* 405 U.S. 5

92 S.Ct. 1103 (1972); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 62 S.Ct. 766 (1942).

In *Hackney* v. *Commonwealth,* 186 Va. 888, 45 S.E.2d 241 (1947), the Supreme Court of Virginia stated in 186 Va. at p. 892, 45 S.E.2d at p. 243, as follows:

> "While the statute is penal and must be construed strictly against the Commonwealth, the dominant purpose of its enactment was to preserve peace and good order. . . . A person violates a statute if . . . his conduct is such as tends to corrupt public morals or to outrage the sense of decency of others. . . ."

Further defining the limits of the statute, the court in *Taylor* v. *Commonwealth,* 187 Va. 214, 46 S.E.2d 384 (1948), in reversing a conviction under the statute, stated that the defendant "had not disturbed any person or persons, or caused any commotion affecting in any degree, the peace and good order. . . ." The Court further stated that neither the words nor the acts of the defendant had a vicious or injurious tendency, offensive to good morals or public decency and that the defendant was guilty of no definite misbehavior or misconduct in the sense that she was disorderly or turbulent.

In *Mercer* v. *Winston,* 214 Va. 281, ... S.E.2d ..... (1973), the Supreme Court of Virginia interpreted § 18.1-255, which provides as follows:

> "If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a misdemeanor, and on conviction fined in any sum not less than two dollars and fifty cents nor more than five

hundred dollars, in the discretion of the jury or the judge trying the case without a jury."

The Court limited the statute's application to "words that have a direct tendency to cause acts of violence by the person to whom, "individually, the remark is addressed." The Court then held the statute not to violate the First or Fourteenth Amendments to the United States Constitution. The Court considered *Gooding, supra,* in so holding.

It is submitted that the interpretation of the breach of peace statute by the Supreme Court of Virginia serves as an interpretation as to what conduct or words are proscribed by § 18.1-253.2.

The language of the statute as construed by the Supreme Court of Virginia is not unconstitutionally vague and overbroad and consequently in violation of the First and Fourteenth Amendments of the United States Constitution.

The statute does not extend to punishment for the expression of unpopular views. It does proscribe words or conduct that would have a direct tendency to cause acts of violence by the person to whom, individually, the remark or conduct is addressed and thus is aimed at protecting public peace and good order and at prohibiting breeches of the peace. It is aimed only at "fighting words." The words, as used in the statute, "riotous or disorderly," are thus neither vague or ambiguous and do not in any fashion proscribe constitutionally protected conduct or speech.

The jury was instructed that disorderly conduct was "behavior as tends to disturb public peace or good order." (Tr. 209). The jury was further instructed that the language on the sign carried by the defendant (Petitioner) would not be the subject of a disorderly conviction by itself (Tr. 210). Those instructions to the jury properly limited and defined the terms of the statute.

Petitioner held a 30 foot long sign 10 feet high. The sign blocked the view of spectators of the events on the field. Petitioner, when asked to move, did not do so. A scuffle ensued and a crowd gathered. The Constitution does not have the effect of affording no protection to those who desire to have the public peace and good order protected.

II.

The Petitioner Was Not Denied Due Process As A Result Of Juror Bernet's Not Being Struck.

Petitioner complains that Juror Bernet was not struck from the jury. Counsel for the Petitioner had asked the jury whether they would believe the testimony of a police officer to be more credible inherently than that of an anti-war demonstrator. After the question, the juror raised his hand.

The juror then stated that the "reason I raised my hand I think was not so much against a war demonstrator as in favor of a police officer." (Transcript, p. 8). She further stated: "A police officer I think would have to be older, more settled is my only reason for answering..." (Tr. 8).

The juror was then asked whether if it had been known that the defendant was an anti-war demonstrator his answer would have been different as to whether he thought he could give a fair trial to both sides. He stated that his answer would be the same (Tr. 11).

The juror further stated, "I think maybe one thing is I was stating as a whole class, not in specific examples. I would certainly listen to what the police officer had to say and I would certainly listen to what the anti-war demonstrator had to say and would try to do this impartially." (Tr. 11). When questioned from the bench, he stated that his decision would depend in a particular case on surround-

ing circumstances and on all the circumstances of the case (Tr. 11).

Counsel for the Petitioner was simply asking the juror as to what weight he would attach to the testimony of particular witnesses. Nothing in the answer given by the juror showed that he could not decide the case fairly and impartially. This is not a case where the juror would have contributed to a tribunal "organized to convict." *Fay* v. *New York*, 332 U.S. 261, 67 S.Ct. 1613 (1947).

In *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961), this Court stated that to hold that a mere existence of a preconceived notion as to the guilt or innocence of a defendant, without more, was insufficient to rebut the presumption of a prospective juror's impartiality. This Court further stated that it was sufficient if a juror could lay aside his impression or opinion and render a verdict based on the evidence presented.

It is submitted that a review of the full *voir dire* testimony of the juror could lead one to only one conclusion—that the juror could impartially try the case.

III.

The Petitioner Was Not Subjected To Double Jeopardy.

Petitioner asserts that the decision of the Municipal Court for the City of Charlottesville was unconstitutional for the reasons set forth in Argument I.

The Commonwealth of Virginia has a two tier system of courts. Section 16.1-136 Code of Virginia (1950), as amended, provides as follows:

> "Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, except in the case of an appeal from any order or

judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence, the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit or corporation court."

In *Colton* v. *Kentucky,* 407 U.S. 104, 92 S.Ct. 1953 (1972), this Court held that in such systems involving a *de novo* trial on "appeal" did not violate the Double Jeopardy Clause of the United States Constitution. The Commonwealth has such a *de novo* system. Section 16.1-136, *supra.*

Petitioner in the Corporation Court for the City of Charlottesville was not convicted of a greater or different offense other than that which he was originally charged and convicted in the Municipal Court.

It is submitted that *Colten* is dispositive of the issue. It has been held that Virginia's procedure is sufficiently analogous to the Kentucky procedure to be governed by the *Colten, supra,* decision. *McClung* v. *Weatherholtz,* 351 F. Supp. 5 (W.D. Va. 1972).

Petitioner cites *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189 (1970). This Court in that case held that the Fifth Amendment prohibits the re-trial of issues already litigated when a new and different offense is charged. In the case at bar, the Petitioner was always charged with only one offense.

Waller v. *Florida,* 397 U.S. 387, 90 S.Ct. 1184 (1970), cited by the Petitioner, merely held that one could not be charged for the same offense in both a municipal and state court. That case is inapposite to the case at bar.

Petitioner elected to accept a *de novo* trial. He could not claim the benefits of the *de novo* trial and at the same time argue that the Commonwealth is denied the benefits thereof. *McClung, supra.*

Lastly, a reading of the decision of the Municipal Court (Tr. 5/11/72 pp. 173-174) indicates that Petitioner's statement that he was acquitted of all conduct except conduct of display of his sign is not borne out thereby. A careful reading of the decision of the Municipal Court clearly indicates that the decision was based on more than the mere display of the sign.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 12th day of April, I mailed three copies of the foregoing brief for the respondent in opposition to the granting of a petition for a writ of certiorari to each of the following:

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